STATE OF MICHIGAN

IN THE SUPREME COURT

KEVIN MACLACHLAN, as Personal Representative of the Estate of **DAVID MACLACHLAN,** Deceased,

Plaintiff-Appellee,

v

CITY OF LANSING, a municipal corporation, **et al.,**

Defendants-Appellant.

Supreme Court No. 128131
Court of Appeals No. 252221
Lower Ct. File No. 02-1949-NI

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL RESPONSE TO DEFENDANT/APPELLANT CITY OF LANSING'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION INVOLVED

I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANTING OF DEFENDANT CITY OF LANSING'S MOTION FOR SUMMARY DISPOSITION WHICH FOUND THAT THE PLAINTIFF'S CLAIM WAS BARRED UNDER THE THEORY OF GOVERNMENTAL IMMUNITY.

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

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STATEMENT OF FACTS

Decedent David MacLachlan was a fare paying passenger riding a Capital Area Transportation Authority (hereinafter referred to as CATA) bus heading south on Pennsylvania Avenue, near the 5700 block, on the evening of Friday, December 15, 2000, some time prior to 5:15 p.m. (Exhibit 1, Complaint, para 23). It was rush hour during the busy holiday season and traffic was at or near its peak. (Exhibit 1, Complaint, para 25). At the stated location, the CATA bus stop and the surrounding sidewalks had not been cleared for several days and were covered with an unnatural accumulation and build-up of several feet of ice and snow. (Exhibit 1, Complaint para 27). The attached photographs demonstrate that in plowing the street, the Defendant City of Lansing created a wall of snow and ice in the roadway, which prevented ingress or egress from the roadway to the sidewalk and/or the CATA bus stop. (Exhibit 2, Photographs of accident site).

At the said time and place, the CATA bus driver stopped the bus upon which the Decedent was riding and the Decedent was let out of the bus. (Exhibit 1, Complaint, para 28). After exiting the bus, the Decedent was trapped between the bus and an unnatural accumulation of ice and snow creating a steep wall of ice and snow at the designated bus stop. (Exhibit 1, Complaint, para 29)(Exhibit 2, Photographs of the accident site). The wall of snow and ice created a defect in the roadway which made it impossible for the Decedent to leave the portion of traveled on highway.

Due to the giant wall of ice and snow created by the Defendant City of Lansing plowing the street, the Decedent was forced to begin walking northbound against traffic in the traffic lane closest to the curb of southbound Pennsylvania Avenue. (Exhibit 1, Complaint, para 30). The Decedent attempted to get out of the traffic lane that he was trapped in because of the wall of ice and snow on the roadway, which was between three

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and four feet high, preventing him from getting to the sidewalk. (Exhibit 1, Complaint, para 30). As he walked in the lane of traffic, the Decedent was struck by an oncoming vehicle being driven by Robert Zapolski. (Exhibit 1, Complaint, para 31). As a result of the impact, the Decedent was thrown several feet into the air. (Exhibit 1, Complaint, para 32). Tragically, the Decedent died on December 17, 2000, two days after being struck. (Exhibit 1, Complaint, para 35).

The accumulation of snow and ice in the street and in front of the CATA bus stop was an unnatural accumulation of snow and ice, having been plowed into a giant wall of snow and ice by Defendant City of Lansing. (Exhibit 1, Complaint, para 82). The snow and ice was piled so high that it amounted to a defect on the improved portion of the highway. (Exhibit 1, Complaint, para 83).

In his Complaint, the Plaintiff asserted that Defendant City of Lansing breached the following duties it owed to the Decedent and to the public in general:

A. Failing to adequately maintain the city streets, sidewalks, and surrounding areas reasonably free of excessive ice and snow, particularly in the areas of designated CATA transportation stops;

B. Created an unnatural accumulation of ice and snow which partially blocked the traveled portion of the roadway and completely blocked pedestrians such as the Decedent David MacLachlan to be able to safely move off the main road and reach an area of reasonable safety, i.e., the CATA bus stop or the sidewalk;

C. Failed to ensure that citizens using public transit, including pedestrians and/or passengers such as Decedent David MacLachlan, would not be exposed to preventable safety hazards, risks of injury, or unreasonable

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dangers;

D. Failed to undertake any and all reasonable measures to keep its bus stops, the street in front of the bus stop, and the sidewalks, free from excessive build-up of snow, ice, and other debris;

E. Failed to keep CATA bus stops and surrounding areas, including sidewalks, reasonably accessible to pedestrians and the public;

F. Failed to ensure, or otherwise assist in ensuring, that passengers such as Decedent be able to safely move off the main road and reach an area of reasonable safety, upon alighting CATA vehicles at designated stops;

G. Failed to plan for and recognize weather-related issues necessitating passenger drop-offs at one or more alternative sites, such as the nearest crossroad or at the next "clear" and accessible CATA bus stop; and

H. Failed to timely and effectively enforce its own local ordinances regarding snow removal among commercial entities, despite having knowledge of widespread failure of compliance along a major city street, including but not limited to Lansing City Ordinance 1020.06. (Exhibit 1, Complaint, para 84).

The Defendants brought on to be heard Motions for Summary Disposition in the Trial Court. The Trial Court granted the Motions for Summary Dispositions in an Order and Opinion dated October 1, 2003. (Exhibit 3, Court's Order and Opinion dated October 1, 2003). In addition, the Trial Court entered an Order Denying Plaintiff's Motion for Reconsideration on October 29, 2003. (Exhibit 4, Court's Order Denying Plaintiff's Motion for Reconsideration dated October 29, 2003).

The Plaintiff appealed the Trial Court's decision in the Michigan Court of

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Appeals. In an unpublished decision dated January 20, 2005, the Michigan Court of Appeals affirmed the portion of the Trial Court's Order granting CATA and John Doe's Summary disposition on the basis of governmental immunity. However, the Court of Appeals reversed the portion of the Trial Court's Order granting the City of Lansing's Motion for Summary Disposition. (Exhibit 5, Michigan Court of Appeals 'decision dated January 20, 2005). In reversing the Trial Court's granting Defendant City of Lansing's Motion for Summary Disposition, the Court of Appeals held the accumulation of ice and snow at the CATA bus stop was the result of unnatural causes and there was no dispute that the wall of ice and snow was created by the plowing efforts of the City of Lansing. The Court of Appeals stated that reasonable minds could not differ on the fact that the snow wall was an unnatural accumulation. (Exhibit 5, Court of Appeals' decision dated January 20, 2005).

The Court of Appeals further held that a municipality can be liable in clearing ice and snow when it "introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation." The Court said that a jury may conclude that the city's act of piling ice and snow so high that it would be difficult, if not impossible, to traverse, introduced a new element of danger that exceeded the inconvenience posed by a natural accumulation. (Exhibit 5, Court of Appeals' decision dated January 20, 2005).

The Court of Appeals also ruled that the Plaintiff, through his expert, presented evidence that the city had adequate time to remove the snow wall from the bus stop and that it would not have been an unreasonable burden in light of the potential risk, for the city to leave or create an opening in the piled snow to allow access to the sidewalk in an area designated as a bus stop. "We accordingly conclude that plaintiff has created a

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justiciable question of fact relative to the alleged unnatural accumulation of ice and snow in the form of a snow wall and in avoidance of governmental immunity." (Exhibit 5, Court of Appeals' decision dated January 20, 2005).

On October 7, 2005, The Michigan Supreme Court entered an Order scheduling oral argument and requesting the parties file supplemental briefs on whether to grant the application or take other peremptory action pursuant to MCR 7.302(G)(1). (Exhibit 6, Supreme Court Order dated October 7, 2005).

ARGUMENT

I. THE MICHIGAN COURT OF APPEALS DID NOT ERR IN REVERSING THE TRIAL COURT'S GRANTING OF DEFENDANT CITY OF LANSING'S MOTION FOR SUMMARY DISPOSITION WHICH FOUND THAT THE PLAINTIFF'S CLAIM WAS BARRED UNDER THE THEORY OF GOVERNMENTAL IMMUNITY.

Standard of Review

Michigan appellate courts review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

Defendant City of Lansing brought its Motion for Summary Disposition under MCR 2.116(C)(7). As a general rule, summary judgment is not favored. *Second Benton Harbor Corp v St. Paul Title Insurance Co,* 126 Mich App 580; 337 NW2d 585 (1983). Nonetheless, MCR 2.116(C)(7) states:

> "The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action."

When a motion is filed under MCR 2.116(C)(7), the court must consider not only the pleadings, but also any affidavits, depositions, admissions or documentary evidence that is filed or submitted by the parties. *Kerbersky v Northen Michigan University,* 458

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Mich 525, 529; 582 NW2d 828 (1998).

Summary disposition is proper under MCR 2.116(C)(7) for a claim that is barred because of immunity granted by law. *Smith v Kowalski,* 223 Mich App 610, 616; 567 NW2d 463 (1997). "When reviewing a grant of summary disposition based on governmental immunity, this Court considers all documentary evidence submitted by the parties. All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Id.* To survive a motion for summary disposition under MCR 2.116(C)(7), the plaintiff must allege facts warranting application of an exception to governmental immunity. *Id. Dampier v Wayne County,* 233 Mich App, 714, 720, 721; 592 NW2d 809 (1999).

Municipal Liability for the Unnatural Accumulation of Ice and Snow

Municipal liability for the unnatural accumulation of snow and ice was first recognized by the Michigan Supreme Court in the case of *Johnson v City of Marquette,* 154 Mich 50; 117 NW 658 (1908), the plaintiff's decedent was driving a cutter upon a City of Marquette street when she was overtaken by a team of horses that had escaped from its driver. Without fault or negligence on the plaintiff-decedent's part, she was trampled by the team and killed. The plaintiff's estate sued the city upon the claim that the cause of the fright to the team which resulted in the loss of control by the driver was a defective condition on the highway.

There was a crossing on the highway in question with the switch at Marquette and Southeastern Railway. The injury to the plaintiff-decedent occurred at a point 350 feet north of the crossing. The team conveying a load of wood being driven by Mr. Prebe was approaching the crossing from the south, and while upon the bridge, at a point 200 feet from the crossing, an unusual noise at a furnace facility startled the team and Mr. Prebe

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could not bring them down to a walk until the crossing of the railway by the highway was reached. At this point he was thrown from the sleigh and lost control of the team.

The evidence showed that an unusual and unnatural accumulation of snow had been formed at this point by shoveling from the railroad tracks onto the highway at either side and into the traveled part thereof snow which had formed a very steep embankment, creating a dangerous embankment.

The Court held: "We do not think it open to serious question that there was evidence in this case that at this crossing there was an unnatural accumulation of snow and ice occasioned by the shoveling from the railroad track so as to produce a hump on either side of the track of several inches depth; thus increasing the height of the bank on either side." Importantly, the Court concluded: "We think it was at least a question for the jury as to whether this left the highway in a condition reasonably safe and fit for travel. It is true that the natural accumulation of snow and ice and the natural results of traveling on same do not of themselves make a case of faulty highway which justifies a jury in finding a municipality in fault. But that is not this case, as the evidence was ample to show that snow was thrown and piled on this highway in such a manner as to make an unnatural hump or ridge on either side of the track." *Id.* at 53-54.

In the Michigan Court of Appeals case of *Hampton v Master Products, Inc, and Village of Yale,* 84 Mich App 767; 270 NW2d 514 (1978), the plaintiff was a deaf mute who slipped on a snowbank formed on a sidewalk located in front of defendant Master Product's building. The sidewalk was located in the Village of Yale. The Plaintiff presented exhibits which clearly showed a snowbank as it covered the sidewalk. She testified that as she walked over the drift (she did not walk in the street because there were cars parked in that area) she sank into the snow, lost her balance and fell against the

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fence on the sidewalk. She was diagnosed as having an impacted fracture of her wrist.

Evidence showed that the drift had been present for two days and that the village had plowed the streets. The Court held that the jury could reasonably have inferred that the defendant Village of Yale had caused the drift to be placed across the sidewalk through the use of its snowplows. A jury could deem the agents of Yale responsible for producing the drift where it was and as high as it was. *Id.* at 773.

The Court of Appeals held the accumulation of snow must be termed "unnatural," and that a jury could reasonably infer that the village was responsible for the unnatural accumulation of snow. *Id.* at 773.

The following year the Michigan Court of Appeals reaffirmed the holding in *Hampton* in the case of *Mendyk v Michigan Employment Security Commission,* 94 Mich App 425; 288 NW2d 643 (1979). In *Mendyke,* the plaintiff slipped and fell in front of the Michigan Employment Security Commission (MESC). She testified at trial that at the time of the accident she was on her way to the MESC office to pick up her weekly unemployment compensation check.

On the morning of the accident, the plaintiff had parked her car in a parking lot across the street from the MESC office. Upon alighting from her car, the plaintiff crossed the street and entered onto a sidewalk that abuts the MESC office. In order to get to the entrance to the office, the plaintiff was required to walk on the sidewalk for about 30 feet. She testified at trial that although it had snowed a short time prior to the accident, the sidewalk appeared to be clear and that snow had been piled along each side of it. Adjacent to the entrance to the MESC office was a mailbox. The plaintiff testified that as she attempted to enter the office she walked in front of the mailbox and at that point she slipped and fell. She was only approximately two or two and one-half feet from the

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entrance to the building when she fell. As she was lying on the sidewalk waiting to be taken to the hospital, she felt the presence of ice underneath her body. As a result of the fall, the plaintiff suffered a broken leg and a broken ankle. An MESC employee stated that when she learned of the plaintiff's fall she ran to the plaintiff's side to comfort her. The employee further testified that she saw snow packed around the base of the mailbox near where the plaintiff had fallen. Some of this snow apparently had melted into water and the water was draining down the sidewalk toward the street.

The plaintiff appealed to the Court of Appeals after judgment of the Court of Claims finding no cause of action. The Court of Appeals reversed and remanded and reaffirmed *Hampton* holding:

> "When, however, the accumulation of ice and snow is the result of unnatural causes, the municipality may be liable. In order to render a municipality liable, the interference with travel must be unusual or exceptional, that is, different in character from conditions ordinarily and generally brought about by winter weather in a given locality." *Mendyk, p. 430 quoting Hampton, p.* 770.

The Michigan Court of Appeals in *Skogman v Chippewa County Road Commission,* 221 Mich App 351; 561 NW2d 503 (1997) noted that some panels of the Michigan Court of Appeals have held that municipal liability exists when the defendant's actions "increased the hazard" to the plaintiff. *Morton v Goldberg*, 166 Mich App 366, 369; 420 NW2d 207 (1988); *Zielinski v Szokola*, 167 Mich App 611, 615; 423 NW2d 289 (1988). To be liable under the increased hazard theory, the defendant's act of removing ice and snow must have introduced a new element of danger not previously present, *Morton, supra*, p 369; *Zielinski, supra*, p 615, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation. *Hampton, supra*; *Johnson, supra.*

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In accord with this line of cases is the Michigan Court of Appeals case of *People v Pedro Diaz,* 450 Mich 974, 984; 547 NW2d 659 (1996), which held that neither private persons nor governmental agencies are subject to liability for injuries caused by a natural accumulation of ice and snow. Where, however, an affirmative governmental undertaking to alter the accumulation of ice and snow increases the hazard of travel, or an undertaking to alter the highway itself that causes an unnatural accumulation does so, there may be liability.

Plaintiff Has a Cause of Action Under the Highway Exception to Governmental Immunity

MCL 691.1407 states that a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. An exception to this statutory mandate is found at MCL 691.1402(1) which states:

> "(1) Except as otherwise provided in §2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be provided in §21 of Chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation out of the improved portion of the highway designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer."

The Michigan Supreme Court in *Nawrocki v Macomb County Road Commission,*

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463 Mich 143; 615 NW2d 702 (2000) discussed the highway exception as it applies to pedestrians. *Nawrocki* held that with respect to the location of the alleged dangerous or defective condition, if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach. The Court in *Nawrocki* stated: "The facts of *Nawrocki v Macomb Co Rd Comm* require us to apply these principles to determine whether the statutory language of the highway exception imposes a duty on the state and county road commissions to protect pedestrians from dangerous or defective conditions in the improved portion of the highway designed for vehicular travel, even when injury does not arise as a result of a vehicular accident. We conclude that it does." *Id.* at 162. The Court stated that the criterion used by the Legislature in enacting 1402 was not based on the class of travelers, but the road on which they travel. *Id.* at 164. "Public travel" encompasses both vehicular and pedestrian travel. *Id.* at 172.

The *Nawrocki* Court further stated:

> "The mcrc argues that, as a general rule, pedestrians are excluded from the protection of the highway exception. It contends that, even if pedestrians are not excluded as a general rule, they may benefit from the highway exception only when the improved portion of the highway is not reasonably safe for *vehicular* travel, as opposed to pedestrian travel.
>
> We believe, however, that pedestrians may recover damages from the state or county road commission for personal injuries and property damage, the same as all other persons, when such injury or damage is proximately caused by a failure of the state or county road commission to carry out its duty to repair and maintain the narrowly defined location prescribed by the fourth sentence of the statutory clause: 'improved portion of the highway designed for vehicular travel.'" *Id.* at 162-163.

The Michigan Supreme Court in *Nawrocki* acknowledged that municipalities owed a higher duty of care to pedestrians and held that "We acknowledge that repairing and

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maintaining the improved portion of the highway in a condition reasonably safe and convenient for public travel represents a higher duty of care on the part of the government than repairing and maintaining it for vehicular travel." *Nawrocki,* fn. 28.

The highway exception to governmental immunity applies in the instant matter for the reason that the Defendant City of Lansing's actions created a wall of snow and ice on the traveled upon roadway that prohibited the Decedent from leaving the improved portion of the roadway. The wall of snow and ice was a defect on the improved portion of the roadway, making travel unsafe for both vehicular traffic and pedestrian traffic. Because of the snow and ice on the roadway, the Decedent was not able to get off of the improved portion of the roadway; he was trapped in a lane of vehicular travel.

Defendant City of Lansing had a Duty to Not Create an Unnatural Accumulation of Snow and Ice on its Public Roadways

The Court of Appeals held that the Defendant City of Lansing did create a "unnatural" accumulation of snow in the roadway. This unnatural accumulation of snow and ice was a defect in the actual roadway.

The Defendant City of Lansing cited many cases and argued as though the Plaintiff were walking on a city sidewalk and that the snow and ice were a natural accumulation.

The Plaintiff was not walking on a city sidewalk and the Plaintiff does not allege that the snow and ice wall was the product of a natural accumulation of snow and ice. Rather, the Plaintiff asserts that the Defendant created a defect on the improved portion of the roadway by plowing snow into giant walls and creating a large wall of unnatural ice and snow to remain on the traveled portion of the improved roadway which did not allow the pedestrian Plaintiff to leave the roadway and reach the sidewalk.

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In the case of *Hampton v Master Products,* 84 Mich App 767; 270 NW2d 514 (1978), the Court of Appeals held that in order to render a municipality liable under the unnatural accumulation doctrine, the interference with travel must be unusual or exceptional, that is, different in character from conditions ordinarily and generally brought about by winter weather in a given locality. *Id.* at 770.

In the case at bar, even in Lansing, Michigan, unnatural accumulation caused by the Defendant City of Lansing created a giant wall of ice and snow plowed and piled in the improved portion of the roadway is exceptional and different in character from the usual treatment of snowfall on public streets.

Even if an issue exists as to whether the snow and ice wall was a natural accumulation as opposed to an unnatural accumulation "in almost every case whether the condition was due to a natural accumulation or an artificial or unnatural accumulation or condition is one of fact for the jury." *Haliw v City of Sterling Heights,* 464 Mich 297, 319; 627 NW2d 581 (2001) citing *Woodworth v Brenner,* 69 Mich App 277, 281; 244 NW2d 446 (1976). For the reason that a question of fact exists, granting summary disposition pursuant to MCR 2.116(C)(8)or (10) in favor of the Defendant City of Lansing was inappropriate.

To be liable under the increased hazard theory, the defendant's act of removing ice and snow must have introduced a new element of danger not previously present. *Morton v Goldberg, supra* at 369, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation. *Hampton, supra. Johnson, supra* at 50. The Court of Appeals found that in plowing the street and allowing the massive wall of snow and ice to remain on the roadway, the Defendant City of Lansing did introduce a new element of danger not previously present.

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The Defendant asserted that the courts have stated that the test as to the existence of an unnatural accumulation is whether the defendant's actions "increased the hazard" to the plaintiff. The Defendant cited the case of *Skogman, supra* at 354, to support its assertion. To be liable under the increased hazard theory, a defendant's acts of removing snow and ice must have introduced a new element of danger not previously present or created an obstacle to travel that exceeds the inconvenience posed by a natural accumulation. *Id.* As stated above, Defendant City of Lansing's plowing the road and creating a wall of snow and ice on the traveled portion of the improved roadway did introduce a new element of danger to pedestrians, including the Decedent, who could not escape to safety from the improved portion of the roadway traveled upon by vehicular traffic.

In *Skogman, supra*, the Court of Appeals agreed with the trial court that the defendant's actions in plowing the road did not introduce a new element of danger or create exceptional conditions different in character from those to be expected in the Upper Peninsula in February. In *Skogman* the defendant road commission plowed one lane going in each direction. The Court argued that the defendant could only plow one lane at a time. The unplowed portion of the roadway had only three to five inches of snow on it. *Id.* at 353. In the case at bar, the snow plowed into the piles were several feet high and remained on the traveled portion of the roadway.

In supporting its position that the increased hazard exception does not exist in the instant matter, the Defendant also turned to *Weider v Goldsmith*, 353 Mich 339; 91 NW2d 283 (1958). The Defendant noted that the *Weider* Court explained that the *sine qua non* of the doctrine of increased hazard exception is that a new element of danger, not theretofore present, must be introduced by the acts of the defendants.

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In the case at bar, a new element of danger was introduced in that with Defendant plowing the streets it created a massive wall of ice and snow on the improved and traveled upon roadway which amounted to a defect on the roadway. The resultant danger was that pedestrians alighting buses could not leave the improved portion of the traveled upon roadway. They were trapped in the lane of vehicular travel.

The Defendant also cited *Woodworth, supra*, which quoted *Taggart v Bouldin,* 168 A 570 (NJ, 1933) which stated:

> "The action of the defendant, in having the sidewalk shoveled off, introduced no new element of danger, rather the opposite resulted and the danger was lessened. . . ."

In the case at bar, the danger was not lessened by the city plowing snow into a massive wall on the improved portion of the roadway. Had the Defendant not plowed at all no defect in the roadway would have been created and the Decedent would have been able to safely leave the improved and traveled upon roadway.

Plaintiff's expert, Gerald H. Dresselhouse, testified by way of Affidavit regarding Defendant City of Lansing's liability in the accident which killed the Decedent. Mr. Dresselhouse is a Civil Engineer with over 40 years of experience in highway and traffic safety, design, construction, and maintenance of highways, roads, streets, and bridges. (Exhibit 7, Curriculum Vitae of Gerald Dresselhouse)(Exhibit 8, Affidavit of Gerald H. Dresselhouse).

In his Affidavit, Mr. Dresselhouse stated that, in his opinion, Defendant City of Lansing owed a duty to the Plaintiff David MacLachlan to keep the city streets, sidewalks and surrounding areas reasonably free of excessive ice and snow. (Exhibit 8, Affidavit of Gerald Dresselhouse). He further testified that the Defendant City of Lansing caused an unnatural accumulation of snow and ice creating a 3 to 4 foot wall on the roadway at the

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CATA bus stop. (Exhibit 8, Affidavit of Gerald Dresselhouse.). Mr. Dresselhouse testified that he read Lansing City Ordinance 1020.06 and that he was provided and reviewed climatological records for Lansing, Michigan for the months of November and December, 2000. (Exhibit 8, Affidavit of Gerald Dresselhouse). Mr. Dresselhouse concluded that the Defendant City of Lansing failed to enforce its local ordinances regarding snow removal despite knowing the numerous failures to comply. (Exhibit 8, Affidavit of Gerald Dresselhouse).

The City of Lansing ordinance states that private land owners must clear their property of ice and snow within a specific amount of time. (Exhibit 9, Lansing City Ordinance). Specifically, the statute reads:

> "(a) No person shall permit any snow or ice to remain on any sidewalk adjacent to any house, building or lot owned or occupied by that person, or on the sidewalk adjacent to any multifamily dwelling or unoccupied house, building or lot owned by the person for more than twenty-four hours after the same has fallen or formed.
>
> (b) No person shall place or cause to be placed ice or snow upon a right of way so as to impair vehicular or pedestrian traffic." (Exhibit 9, Lansing City Ordinance No. 1020.06).

Mr. Dresselhouse will testify that the City of Lansing should plow ice and snow on private property if the property owner neglects to do so within a specific amount of time.

After analyzing the climatological records, it was Mr. Dresselhouse's opinion that the Defendant City of Lansing had adequate time to remove the ice and snow from the sidewalk and the bus stop prior to the time of December 15, 2000 incident. (Exhibit 8, Affidavit of Gerald Dresselhouse).

Mr. Dresselhouse likewise stated that the unnatural accumulation of ice and snow at the accident site introduced a new element of danger present for the Plaintiff which was not previously present. (Exhibit 8, Affidavit of Gerald Dresselhouse). Finally, Mr.

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Dresselhouse concluded that the Defendant City of Lansing's creation of an unnatural accumulation of ice and snow was a proximate cause of the injuries and subsequent death of Plaintiff David MacLachlan. (Exhibit 8, Affidavit of Gerald Dresselhouse).

Accordingly, the Michigan Court of Appeals was correct in its ruling reversing the Trial Court's Order Granting the Defendant City of Lansing's Motion for Summary Disposition. (Exhibit 5, Michigan Court of Appeals Opinion dated January 20, 2005)

CONCLUSION

For all of the reasons stated above, the Plaintiff-Appellee respectfully requests that this Honorable Court deny the Defendant-Appellant's Application for Leave to Appeal.

Date: November 4, 2005

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